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Connecticut **Business&Industry** *Association*

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Before the Committee on Labor and Public Employees
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H.B. 6989 (COMM) AAC Non-compete Agreements (Opposed)

Good Morning Senator Prague, Representative Ryan and other members of the Committee. My name is Kia Floyd and I am an Assistant Counsel for Labor & Employment matters for the Connecticut Business and Industry Association (CBIA). CBIA represents more than 10,000 companies throughout the state of Connecticut, ranging from large corporations to small businesses. The vast majority of our companies employ fifty (50) or fewer employees, many of whom make up Connecticut's workforce. I am here today to speak on behalf of all of our member companies. CBIA generally supports any labor and employment related legislation that does not increase the costs of doing business in the state or unreasonably increase administrative burdens on employers in dealing with employment and workplace issues. Insofar as H.B. 6989 would generally prevent businesses from protecting their legitimate business and propriety interests through the use of non-compete agreements, CBIA must strongly oppose this measure as both originally drafted and as amended.

As originally drafted, H.B. 6989 amended The Uniform Trade Secrets Act (C.G.S. §35-51) to prohibit an employer from requiring an employee to sign a non-compete agreement which prevents the employee from working in the same or similar job in the same location. As recently amended, this legislation now exempts broadcast employers, from the general prohibition and lays out some limited exceptions where the use of non-competes and restrictive covenants may be acceptable, such as: the sale or disposition of business goodwill; dissolution of a business partnership; and termination of a business interest in a limited liability corporation.

Legal Requirements for Non-Compete Agreements

Non-compete agreements and restrictive covenants are commonly used in a variety of business industries to protect the time and investments that companies make in building their products, resources and customer base. In today's increasingly competitive global economy, restrictive covenants and non-compete agreements may be the only effective ways to protect an employer's business in some industries. Connecticut law already provides that restrictive covenants and non-compete agreements are only enforceable if the restraint on an employee is reasonable and balanced with the employer's interest in protecting: trade secrets, customer lists, confidential information, unique and extraordinary services, goodwill and the like. Courts looks at several factors in determining whether a particular agreement should be upheld:

(1) the length of time the restriction operates;

(2) the geographic area covered;

(3) the fairness of the protection accorded to the employer;

(4) the extent of the restraint on the employee's opportunity to pursue his occupation; and

(5) the extent of interference with the public's interests.

Trans-Clean Corp. v. Terrell, 1998 WL 142436 (Conn. Super 1998)

Courts Are The Proper Forum for Scrutinizing Non-Compete Agreements

In deciding whether to enforce a non-compete agreement, courts will balance the need to protect the employer's legitimate business interests with any burden that enforcement of the agreement would place on the employee. Courts recognize that employers have a right to earn a living, but employers also have a right to protect their relationships with customers, safeguard confidential information, and keep competitors from acquiring trade secrets. If a court finds that a particular agreement is unduly prejudicial to a party, it may narrow the scope and duration of the agreement, or it may refuse to enforce the agreement entirely. Ultimately there are a myriad of options available to courts to ensure that a non-compete agreement is fair and balanced to all parties, and a court of law is the best forum in which to determine whether such balance exists.

In allowing the parties to a disputed non-compete agreement to file civil actions for "injunctive or equitable relief as the court deems appropriate," H.B. 6989 appears to recognize that the value of courts in determining what types of agreements pass legal muster. In fact, it was only a few years when the legislature considered ***SB 1037 AAC Restrictive Employment Agreements***, which was introduced by the Labor and Public Employees Committee during the 1999 legislative session. In analyzing that bill, the *Connecticut Law Revision Commission* of the General Assembly found that:

> *[T]he conclusion of the study committee is that Connecticut common law as it exists presently provides an equitable balance between the interests of both employers and employees in determining the enforceability of noncompete agreements. Therefore:*
>
> ***The [C]ommittee recommends that the legislature take no action at this time and allow the courts, which are in the best position to determine the appropriate outcome in each case, to further develop the law in this area as changes in the business community occur and new situations arise."***

Accordingly, by the General Assembly's own admission, issues of enforcement and development of law regarding non-compete agreements are better left to the courts rather than the legislature.

H.B. 6989 Leaves Connecticut Businesses With No Real Protection

Although H.B. 6989 now includes specialized training as a "legitimate business interest" which employers may protect, it does nothing to safeguard employers against former employees with unique knowledge and extensive experience of a company's operations who defect to a competitor. This bill also fails to clearly define the terms "same or similar job," therefore it will be difficult for businesses who utilize such agreements to determine which types of positions fall within the purview of this legislation. Inasmuch as the language of HB 6989 may be subject to multiple interpretations, it will jeopardize the time, resources and investments that companies make in developing employees, building customers and creating business infrastructure. Consequently, measures such as this will negatively affect the state economy by discouraging businesses, especially small start-up companies, from doing business in the state, at a time when Connecticut needs to attract and retain businesses the most.

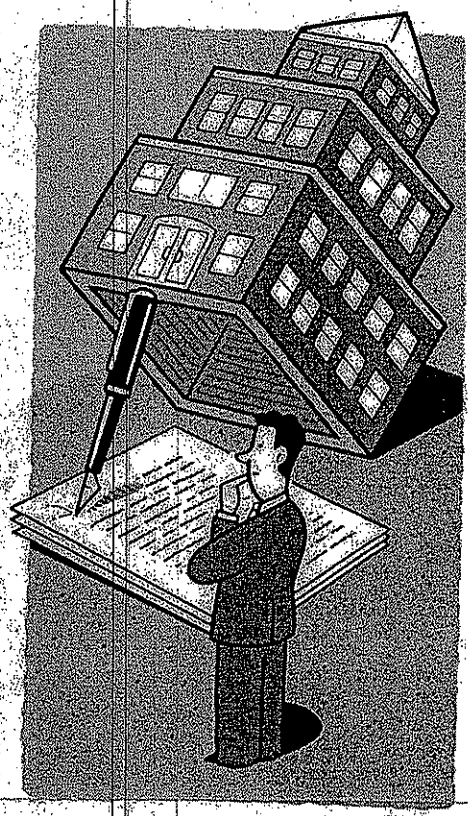
In summary, H.B. 6989 is overly broad and leaves most employers in the state with no ability to safeguard their legitimate business interests when dealing with unscrupulous competitors and former employees. As amended, the bill is prejudiced in favor of the broadcasting industry while other types of employers are left out in the cold. For the aforementioned reasons, CBIA strongly opposes this measure and urges the Committee not to enact it.

Thank you for the opportunity to comment today.

CAREER COUCH

MATT VILLANO

The Noncompete Clause: Balk at Your Own Risk



Chris Reed

Q. *You've been offered a new job, and your prospective employer wants you to sign a noncompete agreement, but the document makes you uneasy. What should you do?*

A. Take some time to scrutinize the terms. Robin Bond, managing partner of Transition Strategies, a law firm in Wayne, Pa., says it's perfectly reasonable to ask to review the details of the agreement before accepting the job.

"When it comes to legal documents, you can never be too careful," Ms. Bond said. "The last thing you want to do is sign something that could affect your ability to earn a living."

Q. *What do noncompete clauses cover?*

A. Generally speaking, these agreements are one-sided contracts designed by companies to prevent employees from competing with them after leaving the fold. Paula Weber, a partner at the San Francisco law firm Pillsbury Winthrop Shaw Pittman, said that companies generally use the documents to protect trade secrets, customer contacts and other forms of intellectual property.

"When a company hires an employee, that company gives the person all sorts of valuable and one-of-a-kind insider information," she said. "The noncompete is one way for the company to protect whatever assets are transferred."

Most noncompete agreements limit what employees can do once they leave, whom they can do it for and where they can do it. In many cases, Ms. Weber added, the documents preserve these restrictions for a defined period that rarely exceeds three years.

Q. *How common are noncompete agreements today?*

A. That depends on where you live and on the industry in which you work. Noncompete agreements are governed by state laws. They are permitted in Florida and New York, for example, while California courts have ruled them to be illegal restraints.

Noncompete agreements are most prevalent in industries where intellectual property is at a premium, like software development.

Ms. Weber noted that companies in some industries might also require the signing of nonsolicitation clauses, which prevent employees who leave a company from recruiting former colleagues. Both agreements fall under a category of contracts known as "restrictive covenants," she said.

Q. *Are the details of noncompete documents negotiable?*

A. They might be. Chris Farella, a partner at Stahl Farella & Sarokin, a law firm in Westfield, N.J., said that, as always, the more a company wants to hire a particular person, the more leverage that person has.

"If you're bringing something to the table that they can't live without, a company will be far more likely to bend," he said. Mr. Farella added that issues like the agreement's duration or the geographic area covered by the agreement were the easiest to negotiate. Usually, however, companies are hesitant to make concessions on an individual basis, Mr. Farella said.

Ultimately, if you don't sign on the dotted line, you may have to start the job search anew.

John Reddish, president of Advent Management International, a consulting firm in Drexel Hill, Pa., noted that some employers might view a request to modify a noncompete agreement as a hostile act, and could withdraw a job offer.

Q. *What can happen if you violate a noncompete agreement?*

A. An expensive lawsuit, for one thing. Because noncompete clauses are legal contracts, employers have the right to sue any employees they suspect to be in violation.

John J. Myers, a partner at Eckert Seamans Cherin & Mellott, a law firm in Pittsburgh, said cases could drag on for months, presenting challenges for employees with limited finances. Mr. Myers added that judges deciding in favor of employers could enjoin, or stop, an employee from working for the new company.

"A court will award compensatory damages, such as lost profits, in addition to issuing an injunction prohibiting the violation of a restrictive covenant," he said. "In other words, the court will put the person out of work."

Breaking a noncompete agreement can lead to other troubles as well. Bryan Cleveland, a lawyer at Ferrell Worldwide in Miami, said that a former employer with whom you had a noncompete agreement could tell your prospective employer that hiring you would make the company an accessory to a crime.

"The tactics can get pretty strong-armed at times," Mr. Cleveland said. "From a company's perspective, pointed threats can be just as damaging as actual litigation."

Q. *Is there a way to avoid these issues altogether?*

A. Not if an employer insists on a noncompete agreement.

Peter Polachi, managing partner at Polachi & Company, an executive search firm in Framingham, Mass., says that because a noncompete agreement has such bearing on future employability, it should be regarded as a crucial facet of a job offer — equivalent to factors like pay and benefits packages.

D. Kevin Berchelmann, president of Triangle Performance, a consulting firm in Spring, Tex., says that if a prospective employer insists on a signed agreement, you have a choice: approve the document or decline it and start your job search all over again.

"Noncompete agreements are not designed to be win-win for employees," he said. "No matter how much you may not like the idea of a noncompete, if you want the job, you may have to sign."

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